

4.3.17  
 Commission's Secretary  
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 Deena Shetler: deena.shetler@fcc.gov  
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 Re: WC Docket No. 06-210  
 CCB/CPD 96-20

## MOTION

### The Commission Only Needs to Rule on the Penalty Infliction Controversy

**Under the Administrative Procedures Act the FCC ONLY Resolves Controversies.  
 There are NO Controversies Within the Scope of the 1995 Referred Controversy  
 that are Left to Resolve Regarding the Traffic only Transfers.**

Petitioners: One Stop Financial, Inc., Winback & Conserve Program Inc., 800 Discounts, Inc., and Group Discounts, Inc. submit the following: Judge Bassler's Decision explicitly stated:

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case closed.

IT IS FURTHER ORDERED that the Plaintiffs, no later than August 1, 2006, file an appropriate proceeding under Part I of the FCC's rules to initiate an administrative proceeding to resolve the issue of precisely which obligations should have been transferred under § 2.1.8 of Tariff No. 2 as well as any other issues left open by the D.C. Circuit's Opinion in AT&T Corp. v. Federal Communications Commission, 394 F.3d 933 (D.C. Cir. 2005).

/s/ WILLIAM G. BASSLER  
 WILLIAM G. BASSLER, U.S.S.D.J.

1) The Inga to PSE and CCI to PSE orders simply requested a traffic only non-plan transfer.

It is irrelevant which obligations transfer because the two traffic only non-plan transfer orders did not mandate upon AT&T any special allocation of obligations had to be first effectuated to process the order.

2) So, the issue is moot regarding which obligations transfer as AT&T within 15 days was required by tariff law to process the order. AT&T has provided no written evidence of denying the traffic only transfers based upon non-adherence to section 2.1.8 within 15 days. So, this question of **which obligations transfer is moot.** Additionally, which obligations transfer on an AT&T conceded traffic only transfer was not a controversy in 1995.

Let's review the fraud AT&T pulled on Judge Wigenton:

AT&T's 3.21.16 brief page 33:

"Counsel's point was that PSE had not agreed to accept "all" of the obligations, not that it was assuming "zero" obligations. And this Court understood AT&T's position:

THE COURT: So your position, then, Mr. Guerra, is had there been some understanding that all the obligations would transfer as well, then everything would have obviously proceeded and the contracts would have been fine and AT&T would have been on board. It was the notation of **"traffic only"** which was sort of the impediment?

MR. GUERRA: Yes. And, again, this is the understanding that the DC Circuit had, the FCC had. Id. at 18 (emphasis added). Moreover, both the D.C. Circuit and FCC did understand that, under the proposed transaction, PSE would not assume all of CCI's obligations."

The notations on the forms were Traffic Only and noted all locations transferred except the ones indicated on the form. **The forms do not indicate any mandate upon AT&T to alter in any way what the 2.1.8 required as far as obligation allocation.**

As the DC Circuit Court determined section 2.1.8 allowed both traffic only and plan transfers. Petitioners simply advised AT&T that the order was a traffic only transfer and not a plan transfer. <sup>1</sup>

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<sup>1</sup> The DC Circuit Decision stated on pg.8:

Absent such reliance, the commission provides us with little reason why the plain language of Section 2.1.8 fails to encompass **transfers of traffic alone.**

and the DC Circuit Decision stated on pg.10:

As the foregoing discussion indicates, we find the Commission's interpretation implausible on its face. First, the plain language of Section 2.1.8 encompasses all transfers of WATS, and **not just transfers of entire plans.**

AT&T of course cannot produce one single statement within 15 days of the traffic only transfers in 1995 that AT&T was denying the traffic only transfer because section 2.1.8 required on a traffic only transfer to transfer revenue and time commitments. There are none.

AT&T's position was exactly the opposite arguing that because section 2.1.8 mandated that the revenue and time commitments must stay with the non-transferred plan AT&T was denying the traffic only transfers based upon section 2.2.4 fraudulent use.

AT&T simply scammed to Judge Wigenton. AT&T understood section 2.1.8 allowed both traffic only and plan transfers. Petitioners were simply advising AT&T that this was a traffic only transfer not a plan transfer and then the explanation continued with stating the accounts to remain. **There is no mention of obligation allocation in the order to AT&T.**

The FCC 2003 Order para 4 page 3 understood the Traffic Only No Plan Transfer sentence as it cited the Judge Politan Decision:

Accordingly, CCI and PSE jointly executed and submitted to AT&T nine TSA forms for each of the nine plans.<sup>[1]</sup> At the bottom of each TSA, in handwriting, these parties directed AT&T to move the **"traffic only"** on each plan to PSE.<sup>[2]</sup> The January 13 letter, under which these nine TSAs were forwarded, directs AT&T to **"move the locations associated with these plans [but] not ... in any way to discontinue the plans."**<sup>[3]</sup> In this way, CCI and PSE attempted to move to PSE the end-user traffic associated with each of the nine CSI CSTP II/RVPP plans, **but not to move the actual plans themselves.**

DC Circuit Court Reference to Traffic Only Statement:

AT&T, however, argues persuasively that the FCC misinterpreted its comment. Immediately following the alleged concession, AT&T's submission noted that: [Section 2.1.8], by its terms, allows a transfer of CCI's service to PSE only if PSE agreed to assume all obligations under those **plans**. *Yet CCI explicitly amended the transfer of services form to read "Traffic Only."* By expressly declaring that it did not intend to effectuate a transfer of all obligations under the **plans** to PSE . . . *the proposed transfer, on its face, violated the terms of Section 2.1.8.*

What AT&T asserted to the FCC was an intentional **misstatement of facts** that petitioners traffic only non-plan transfer was a **plan** transfer. AT&T had **conceded** under its Tr8179 substantial cause filing of February 16<sup>th</sup> 1995 that petitioners transaction was a traffic only transfer, but asserted it had the implicit right to mandate a PLAN transfer. A **plan** transfer did require the revenue and time commitments to transfer under 2.1.8 and so that was why AT&T was asserting

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<sup>[1]</sup> *First District Court Opinion* at 10; see Exhibit H to Petition.

<sup>[2]</sup> *See First District Court Opinion* at 10; Exhibit H to Petition.

<sup>[3]</sup> *See Exhibit H to Petition.*

that petitioners UNDER A **PLAN** TRANSFER would be violating section 2.1.8., if it did not transfer the revenue and time commitments.

AT&T did not say that petitioners under a **traffic only** transfer would be violating 2.1.8. AT&T understood that only on a **plan** transfer as in the INGA TO CCI **plan** transfer do the revenue and time commitments transfer. AT&T was simply misstating the facts of the transfer to the FCC in 2003---that it was a plan transfer and not a traffic only transfer.

The key here is not what AT&T was stating to either the FCC in 2003. The key is AT&T had no evidence to show Judge Wigenton that within 15 days of the traffic only transfers, that AT&T asserted anything close to a statement such as: Section 2.1.8 requires traffic only transfers to transfer the revenue and time commitments.

There are absolutely no AT&T statements in the record made by AT&T within 15 days of the required written denial that AT&T was even confused by the Traffic Only sentence. AT&T understood the traffic only sentence simply was a traffic only non-plan transfer order, as opposed to a plan transfer order. The FCC understood this also.

The real key is what Judge Politan understood in 1995. AT&T's sole defense and thus the controversy in 1995 was whether section 2.2.4 fraudulent use could prohibit a permissible 2.1.8 traffic only transfer. AT&T was asserting that revenue and time commitments DO NOT Transfer under section 2.1.8 on a traffic only transfer:

See NJFDC Judge Politan March 1996 page 17 fn 7

“Indeed, **AT&T's own counsel** focused the issue by indicating that the tariffed obligations “*involved herein*” are all **tariffed obligations**, for which **“CCI, not PSE”** would be obligated.

During the 11.28.95 hearing AT&T counsel kept asserting its fraudulent use defense that under 2.1.8 the tariffed obligations don't transfer and CCI's Mr Shipp kept **agreeing** that as per section 2.1.8 plan commitments don't transfer. It led to this comment:

AT&T's Whitmer: And one of the obligations of the customer, Winback & Conserve or CCI, that did not go to PSE in the attempted transfer was the obligations for shortfall and termination correct?

Mr Shipp: **That's correct.** And we so **identified that on the transfer of service document.**

The Court: **I know all these facts, Mr Whitmer. I really do. I swear to God.**

Mr Whitmer: I have no further questions.

AT&T counsel simply scammed Judge Wigenton silly asserting that in January 1995 it denied the traffic only non-plan transfer because of the notes advising AT&T to do a traffic only transfer as opposed to a plan transfer. If it was AT&T's position that revenue and time commitments transfer on a traffic only transfer, then why didn't AT&T simply transfer those obligations!

Petitioners simply ordered a traffic only non-plan transfer and it was mandatory that AT&T transfer which ever obligations the tariff mandated. If the revenue and time commitments transferred on a traffic only transfer then AT&T would not have filed a substantial cause pleading on February 16, 1995 seeking to FORCE the plan to transfer to force the revenue and time commitments to transfer. How could AT&T have been asserting that the Traffic Only non-plan transfer Notations meant PSE was violating the tariff for not accepting revenue and time commitments when it was AT&T who first brought up the issue of obligations asserting that revenue and time commitments do NOT transfer on a traffic only transfer. As usual with no evidence, AT&T simply intentionally created a fraud decades later to scam Judge Wigenton's Court. How could AT&T have been asserting PSE must assume the revenue and time commitment when the evidence shows Judge Politan was ready to jump down from the bench and hit AT&T's counsel over the head with the gavel if he again repeated that under the tariff the revenue and time commitment do not transfer.

AT&T 3/21/1995 cross examination of Mr. Inga:

Whitmer: Q: Mr Inga, you know, do you not that if the service, except for the home account— or Mr. Yeskoo called it the “lead account” ---is transferred to PSE the shortfall and termination liabilities remain with Winback & Conserve, isn't that correct?

Inga: Yes

Can you imagine current AT&T counsel having the brass balls to intentionally lie to Judge Wigenton and assert in 2014 that AT&T denied the transfer in 1995 because PSE did not assume the revenue and time commitments which AT&T claimed in 1995 the tariff does not require PSE to assume the revenue and time commitment.

Judge Politan wanted to know how many traffic only transfers AT&T had done during the March 8th 1995 Oral Argument. Judge Politan was trying to get an idea of the size of the transfers and how many aggregators had defaulted on the remaining revenue commitments.

AT&T Counsel Whitmer asserted to

“But there are literally - - my guess is hundreds, if not thousands, of transfers that have happened among aggregators and aggregations plans.”  
NJFDC Oral Argument pg. 53

AT&T counsel Whitmer confirmed AT&T as of March 1995, had done thousands of traffic only non-plan transfers. Of course, current AT&T counsels-- post DC Circuit Court ---scammed Judge Bassler and now Judge Wigenton with its brand-new defense that on a traffic only transfer the revenue and time commitment transfer. Of course, even though AT&T counsel Whitmer conceded AT&T has done thousands of traffic only transfers AT&T can't show one in which the revenue and time commitment transfer. It was simply an intentional fraud on Judge Wigenton.

The bottom-line is the traffic only transfer made no special stipulation as to allocation of obligations. If AT&T really believed revenue and time commitments transfer on a traffic only, non-plan transfer then there was no reason why AT&T shouldn't have processed the order. Given the fact that section 2.1.8 and 3.3.1.Q bullet 4 allows traffic to transfer without the plan transferring and petitioners did not place any obligation stipulations on the order --- it is

irrelevant to 1) raise a new defense and 2) AT&T was simply required to do whatever its tariff mandated as far as obligation allocation—so the Judge Bassler is moot no matter which obligations were supposed to transfer.

3) AT&T filed Tr 8179 on February 16<sup>th</sup> 1995 which was a FCC substantial cause pleading to make explicit in section 2.1.8 what AT&T asserted was already implicit. AT&T conceded petitioners transactions were a traffic only transfer but under Tr8179 wanted to force a **plan** transfer to force the revenue and time commitments to transfer. AT&T's sole criterion for forcing a plan transfer was based upon suspicion of not being able to collect on shortfall charges on the plan that transferred away substantial end-user location traffic. If it was already implicit within 2.1.8 that AT&T could simply determine that a conceded traffic only non-plan transfer was a plan transfer, then it was AT&T's responsibility to simply transfer the plan within 15 days.

AT&T counsel Richard Meade certified to Judge Politan that the FCC denied AT&T's implicit argument. The FCC advised AT&T that if TR8179 were to go into effect it would be a prospective change as it was a substantive changing of section 2.1.8. AT&T did not want a prospective change as that would grandfather the Inga Companies January 1995 transactions, so AT&T simply withdrew Tr8179. Additionally, the FCC advised AT&T that it did not like Tr8179 as it allowed AT&T to subjectively discriminate by measuring intent of the former customer. After Tr8179 was withdrawn on June 2<sup>nd</sup> 1995 AT&T's sole defense and thus the controversy in 1995 was whether section 2.2.4 fraudulent use could prohibit a permissible 2.1.8 traffic only transfer. AT&T replaced Tr8179 with Tr9229 which required the former customer to post security deposits against potential shortfall and this was a mathematical non-subjective way to measure intent. Tr9229 went into effect prospectively in November 1995.

The FCC 2003 Decision Pg.10 para 13:

“Because AT&T did not act in accordance with the **“fraudulent use”** provisions of its tariff, which did not explicitly restrict the movement of end-user locations from one tariff plan to another, AT&T cannot rely on them as authority for its refusal to move the traffic from CCI to PSE. AT&T does not rely upon **“any other provisions of its tariff”** to justify its conduct.”

The FCC in 2007 issued its order stating the June 2006 referral did not expand the scope of the original referral on fraudulent use. Judge Politan's May 1995 decision stated the outcome of Tr8179 would resolve that implicit assertion controversy—and it did as AT&T was denied its substantial cause pleading regarding its implicit 2.1.8 assertion. Since fraudulent use has been decided against AT&T there is nothing left for the FCC to interpret. AT&T's belief that it can resurrect an implicit defense that would be prospective in any event has been denied by the FCC with the FCC's January 12<sup>th</sup> 2007 order. AT&T opposed the FCC's reissuance of the January 12<sup>th</sup> 2007 FCC order because AT&T knows that FCC order confirmed there were no controversies left to resolve within the scope of the original referral on fraudulent use. The Commission allowed the parties to comment and found no argument from AT&T that enabled it to resurrect its Tr8179 implicit assertion and removed the case from circulation.

4) Even if the FCC had agreed with AT&T in Jan 1995's substantial cause pleading position plaintiffs' would still prevail as that transaction would simply be classified as an entire plan transfer and, as per AT&T, would be accorded a 66% discount anyway:

AT&T's Preliminary brief to FCC May 22<sup>nd</sup> 2006 Exhibit A pg 13

First, the purpose articulated by Petitioners did not require the transfer of the traffic without the plan; **it could have been accomplished** merely by an agreement with PSE which could have been entered into even with a transfer of the **underlying plans**. There is thus no explanation for Petitioners' failure to transfer to PSE the entire plan (including the shortfall and termination obligations) other than the illicit desire to separate the plans' traffic from their liabilities and thereby to evade the shortfall or separation of the plans' assets (revenue stream) from their liabilities (volume commitments) could simply have no other purpose.

5) AT&T concedes that even if the FCC/DC Circuit determined the transaction was a plan transfer the 66% discount --as per AT&T---would have still been accomplished under a plan transfer. What AT&T does not point out is that if petitioners held the pre-June 17<sup>th</sup> 1994 immune plans -----those plans would be able to be upgraded into a contract tariff without security deposit as petitioners would still be considered an existing AT&T customer ---not a **FORMER** AT&T customer. Therefore, the Judge Bassler referral is **moot** as per AT&T's 2.1.8 defense of mandating a traffic only transfer is a plan transfer as AT&T conceded the 66% would have been accomplished anyway.

6) All parties agreed that on a traffic only, non-plan transfer the revenue and time commitments must remain with the non-transferred plan. So, this was not a controversy in Judge Politan's Court in 1995. Therefore, the FCC was not asked to address which obligations transfer.

The DC Circuit Court understood that its scope for review is limited to only what the Commission interpreted:

---"The Communications Act **precludes us from addressing only those issues which the Commission has been afforded no opportunity to pass.**" 47 U.S.C. Section 405(a)." (DC Circuit Decision in Plaintiffs initial brief pg. 10 fn1.

--- "How this enumeration affects the requirement that new customer assume "*all* obligations of the former Customer" (emphasis added) is **beyond the scope of our opinion.**" DC pg. 11 fn2

---"We also do not decide precisely which obligations should have been transferred in this case, as this question was **neither addressed by the Commission** nor adequately presented to us." DC Circuit Page 11

7) AT&T's Tr8179 Defense was filed on February 16, 1995 and withdrawn on June 2, 1995. That AT&T defense took the position that it was already implicit within 2.1.8 that AT&T had sole discretion when to decide a traffic only non-plan transfer should be determined a plan transfer---to force the revenue and time commitments to also transfer. Even though AT&T's defense was a 2.1.8 defense the sole determining criterion that AT&T provided to the FCC was its suspecting the non-transferred plans would end up in shortfall of its revenue commitment. AT&T asserted in 1996 and 2003 that the termination penalty was not a controversy because as AT&T stated and the FCC 2003 Order stated the plans were not going to be terminated---so obviously there would be no termination charges to suspect.

8) AT&T's attempted Tr8179 substantial cause pleading was only based upon its suspicion that the non-transferred plan would not be able to meet revenue commitments. There was **no other** justification why the plan must transfer.

AT&T's Feb 16<sup>th</sup> 1995 Tr8179 substantial cause pleading to FCC:

“If a Customer seeks to transfer, to one or more other Customers, all or substantially all of the 800 numbers associated with an existing AT&T 800 Service Term Plan or Contract Tariff, and the anticipated result of such a transfer would be that the **usage and/or revenue from the remaining 800 numbers associated with the term plan** or Contract Tariff (based on the past 12 months of usage) would not meet the usage and/or revenue commitment of the volume or term plan or Contract Tariff, the transfer will be deemed a transfer of the associated volume or term plan or Contract Tariff to such other Customer(s), and may only be completed in accordance with this Section. If the transfer of service is to a group of two or more other Customers, the new Customer for the volume or term plan or contract tariff will be that group. Each customer in the group will be jointly and severally liable for all of the obligations associated with the transferred service and volume or term plan or Contract Tariff.

9) Given AT&T's conceded fact that petitioners plans were pre-June 17<sup>th</sup> 1994 ordered and at the time of the traffic only transfer the plans were immune from shortfall this is conclusive as Judge Politan had determined AT&T had no merit to suspect shortfall.

The Commission also confirmed the plans were all pre-June 17<sup>th</sup> 1994 ordered and thus immune from shortfall and termination charges: FCC pg. 2 para 2:

“**Prior to June 17, 1994**, the Inga Companies completed and signed AT&T's “Network Services Commitment Form” for WATS under AT&T's Customer Specific Term Plan II (CSTP II), a tariffed plan, which offered volume discounts off AT&T's regular tariffed rates.”

10) The TR 8179 defense under section 2.1.8 was filed after the 15-day written denial and is precluded in any event—but its moot anyway. AT&T counsel Richard Meade certification to Judge Politan regarding Tr8179 that AT&T's 2.1.8 defense was decided by the FCC against AT&T:

The FCC was concerned that the modified language in Section 2.1.8(c) would have had a broader effect than was needed to achieve AT&T's specific purpose, which was simply to clarify its existing right to prevent a location transfer intended to avoid payment of charges, and **so would constitute a substantive tariff change. Meade para 9**

11) Thus, AT&T's counsel admits that the FCC decided against AT&T. All substantive changes are prospective only and thus would not affect the traffic transfer at hand. Other Meade concessions that AT&T 2.1.8 defense under Tr8179 would be prospective and a substantial change:

I and others at AT&T had a number of discussions with the FCC concerning Transmittal No. 8179. In the course of those discussions we explored alternative tariff language that would address more directly the problem (the separation of assets and liabilities) that give rise to the initial filing without requiring a determination as to whether the parties to the transfer intended to avoid payment of charges. Para 10.

In particular, we discussed an alternative approach by which AT&T's concern would be met by requiring a deposit (either in cash or by letter of credit) in the amount of the projected shortfall charge that would apply as a result of the location transfer. The FCC was receptive to this approach, but noted that it would represent a significant change from the pending filing and that it would be appropriate to make that change as a new transmittal, thereby providing interested parties with a new opportunity to state objections. The Commission asked that AT&T withdraw Transmittal 8179 and submit the new approach as a new filing. Meade Certification to Judge Politan Para 11.

Over the summer, AT&T discussed the contemplated across-the-board tariff filing with representatives of a reseller trade group, the Telecommunications Reseller Association ( "TRA") which includes resellers that will be affected by and interested in this package. Revisions were made in response to the reseller input. The contemplated changes were discussed further with the FCC in August and September, and further revisions made. All of these revisions were circulated among the many affected product management groups within AT&T for approval. The time between the withdrawal of Transmittal No. 8179 in June and the filing of transmittal No. 9229 in October was a result of AT&T's desire to solicit and respond to input from resellers and the FCC, and the need to obtain approval from the many different product management groups affected by the changes. Meade para 14.

On October 26th 1995, AT&T Corp. filed Tariff Transmittal No 9229 with the FCC. Transmittal No 9229 addresses the problem implicated in the CCI-PSE transfer--- the segregation of assets (locations) from liabilities (plan commitments) --- in the following manner. Meade para 15.

12) AT&T then explains within paragraph 15 that it added Deposit Requirements to 2.1.8

The Deposit for Shortfall Charges included in Transmittal No. 9229 is a new concept that meets AT&T's business concern more directly, without addressing the question of intent. Because this is new, it will apply only to newly ordered term plans, and so would not be determinative of the issue presented on the CCI/PSE transfer.

13) The Tr9229 tariff revision was explicit that revenue and time commitments do not transfer on a traffic only transfer and answered Judge Bassler moot referral. However, AT&T counsel scammed Judge Wigenton with its bogus assertion that the fundamental terms and conditions of the tariff did not apply only because petitioners were grandfathered from having to post security deposits against potential shortfall as per Tr9229.

**AT&T Counsel Admitted To The Third Circuit What The FCC's "Final Position" Was In Reference AT&T Substantial Cause Pleadings- Agreeing with fellow Counsel Richard Meade.**

14) During oral argument in 1997 (well after AT&T's Substantial Cause Pleadings and proposed retroactive Transmittal 8179) AT&T's counsel admitted under continued questioning on this subject from the Third Circuit that the FCC's final determination of its Substantial Cause Pleading was that adding the transferring of shortfall and termination obligations to section 2.1.8 for traffic transfers were more than codifications and hence a "C" designation for change.

15) AT&T's Counsel David Carpenter concedes the FCC denied AT&T's 2.1.8 defense at the Third Circuit.

Third Circuit Oral Pg 43:

The Court: I'm reading your supplemental ---I read your supplemental brief and it doesn't seem to say all that. I mean, it seems to say **that the issue is going to be decided by the FCC.**

Carpenter: We thought the issue would be decided. The FCC asked us to withdraw the complaint because the FCC thought we had done **more** in the tariff language **than codify** what the tariff already meant

16) If it was implicit it would just codify what the tariff already meant. However, if the change is substantive it must be prospective. This is an additional admission to the Meade admission. The issue of whether the transaction should have been mischaracterized as a plan transfer instead of a traffic transfer was decided when AT&T lost its Substantial

Cause Pleading as AT&T counsel admitted AT&T withdrew Tr8179 on June 2, 1995 from the FCC instead of getting it either rejected or put into effect prospectively and did not advise petitioners when it withdrew the attempt to modify 2.1.8.

17) FCC 2003 Order page 11 advises AT&T that any post tariff revisions would be prospective after January 1995 and would not govern resolution of the traffic only transfer controversy:

**A. Whether a Tariff Revision May Have Retroactive Effect**

1. In their second request for declaratory relief, petitioners ask the Commission to find that “[u]nder standard tariffing law, principles, policies, and as required by the plain language of Section 203 of the Act, AT&T had no legal basis and could not have effectively tariffed any changes or additions to Section 2.1.8 or any other published provision of its Tariff F.C.C. No. 2, subsequent to January 1995, which could have substantively affected CCI’s right to assign the traffic under its CSTEP II plans to PSE in January, 1995.”<sup>2</sup> AT&T does not address the retroactive application of tariff revisions.<sup>3</sup> **We also do not understand AT&T to argue that any revisions to its tariff that became effective after January 1995 govern the resolution of this matter. We decline to rule on this request because the issue is moot.**

18) As the evidence shows AT&T’s Joyce Suek the order processing manager informs petitioners **in June 1995 the same month AT&T withdrew Tr8179** that AT&T has decided to totally shut 2.1.8 down to all traffic only transfers no matter the size.

See exhibit I in petitioners initial filing. AT&T order processing manager Ms. Joyce Suek’s in June 1995 uses of the term “Partial TSA’s” means “traffic only” transfers under 2.1.8 **T**ransfer **S**ervice **A**greement (TSA).

Al --Per our Conversation, 6/19; an original TSA is now required for transfer activity. Additionally, **we “no longer” process partial TSA’s, the TSA must be for the whole plan.**

“**No longer**” obviously means AT&T had been allowing 2.1.8 transfers but stopped. This is an illegal remedy and thus AT&T’s implicit defense would be denied in any event.<sup>4</sup>

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<sup>2</sup> Petition at 8.

<sup>3</sup> See generally Opposition; AT&T Further Comments.

<sup>4</sup> FCC page 12 para 17: If AT&T used a remedy not in accordance with its tariff it can no longer rely upon the defense:

“Assuming that AT&T reasonably suspected “fraudulent use” under section 2.2.4, the remedy under its tariff for the type of fraud it claims it suspected was suspension of service, not refusal to move the traffic. Accordingly, when AT&T availed itself of a remedy not “specified” in its tariff, that action was unauthorized. We grant petitioners’ request for declaratory relief that AT&T had no legal basis to refuse to move the traffic from CCI to PSE.”

19) AT&T does not change its tariff from the January 1995 version; it simply engages in an illegal remedy after the FCC denies Tr8179 going in as an “implicit” modification that would have forced a plan transfer. Obviously AT&T understood that its 2.1.8 defense **was dead and could not be relied upon** as AT&T resorted to its illegal remedy of immediate June 1995 total shut down of 2.1.8. There was no way to transfer less traffic.

20) October 1995 the FCC issues Order that transcends the scope of that case to protect resellers that AT&T as AT&T was violating its tariffs. The FCC mandates that for any issue regarding 2.1.8 or Discontinuation Without Liability section AT&T must file a substantial cause pleading to meet the substantial cause test from November 1<sup>st</sup> 1995 through October 31<sup>st</sup> 1996. AT&T continues to assert it has a Tr8179 2.1.8 defense to the Third Circuit in 1996 despite stating the FCC denied AT&T’s 2.1.8 defense.

21) November 9<sup>th</sup> 1995 AT&T’s Tr9229 Filing that replaced Tr8179 becomes effective. AT&T mandates under Tr9229 that the former customer must put up a security deposit against potential shortfall on the non-transferred plan when substantial traffic is transferred. As a substantial tariff change it is prospective only and petitioners’ 2 traffic only transfers in 1995 are grandfathered. AT&T no longer needs to violate its tariff with the illegal remedy introduced in June 1995 of totally shutting down 2.1.8 to traffic only transfers as AT&T now has in place Tr9229. AT&T also no longer needs to assert that it has an implicit right within 2.1.8 to force a plan transfer to force the commitments to transfer as AT&T has Tr9229 in place.

22) AT&T counsel Meade certification to Judge Politan page 5-6 para 11

“In particular, we discussed an **alternative approach** by which AT&T’s concern would be met by **requiring a deposit** (either in cash or by letter of credit) in the amount of the **projected shortfall charge** that would apply as a result of the **location transfer**. The FCC was receptive to this approach, but noted that it would represent a **significant change** from the pending filing and that it would be appropriate to make that change as a new transmittal, thereby providing interested parties with a new opportunity to state objections. **The Commission asked that AT&T withdraw Transmittal 8179 and submit the new approach as a new filing.**”

23) When AT&T lost its Substantive Cause Pleading it settled for adding additional deposit requirements on a **prospective basis**, and therefore there was nothing within Tr. 9229 and section 2.1.8 that would be determinative of the issue presented on the CCI/PSE transfer.

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Likewise, when AT&T totally shut down section 2.1.8 to all traffic only, non-plan transfers no matter how much traffic was being transferred and no matter which obligations were being transferred AT&T used an illegal remedy. AT&T withdrew Tr8179 on June 2<sup>nd</sup> 1995 and immediately initiated an illegal remedy not authorized by section 2.1.8 and thus by law AT&T can’t rely upon its “implicit Tr8179 defense” in any event.

The Deposit for Shortfall Charges included in Transmittal No. 9229 is a “new concept” that meets AT&T's business concern more directly, **without addressing the question of intent.** Because this is new, it will apply only to newly ordered term plans, and so would not be determinative of the issue presented on the CCI/PSE transfer. (Meade Exhibit N pg.7 para 16 of initial filing.)

24) AT&T brief in 1996 to Third Circuit Page 12 footnote 5 confirms the answer to Judge Basslers moot referral that revenue commitments do not transfer:

FCC Tariff Transmittal 8179 would have made explicit that an existing customer could not transfer even "substantially all 800 numbers on an existing plan" under circumstances **where it would not be able to meet volume or term commitments unless the new customer agreed to assume all of the existing customer's obligations.** See Meade 2d Supp. Cert. ¶ 7 (AA 1267).

25) In 1996 AT&T again confirms to the FCC that Tr8179 issue was all about the non-transferred plan not being able to meet volume commitments that as AT&T asserted do not transfer on a traffic only non-plan transfer.

AT&T's 1996 brief to the FCC page 7 footnote 6

AT&T Transmittal No. 8179 **would have** made explicit that an existing customer could not transfer even "substantially all 800 numbers on an existing plan" under circumstances where it would **not be able to meet volume commitments** unless the new customer agreed to assume **“all of the existing customer's obligations”.**

26) The FCC's Order 2003 noted regarding AT&T's attempt to modify section 2.1.8 with the filing of Tr8179 that when that Order was withdrawn on June 2, 1995 it ended that controversy as per the non-vacated May 1995 Judge Politan Order:

FCC 2003 Order page 11:

“After AT&T refused to permit petitioners to move the traffic, it filed Transmittal 8179 with the Commission in February 1995, which sought to amend Tariff No. 2. The district court's May 1995 primary jurisdiction referral to the Commission **was based, in part, upon AT&T's contention that the Commission's consideration of Transmittal No. 8179 would clarify whether CCI was entitled, under the tariff, to move the traffic without the plans to PSE.** (FOOTNOTE 73 BELOW) According to the record, however, AT&T ultimately

withdrew Transmittal 8179 on June 2, 1995.<sup>[2]</sup> Thus, Transmittal 8179 **never became effective.**

FCC 2003 Order FN 73:

“*See First District Court Opinion* at 12, 16-17; *Second District Court Opinion* at 3-4, 13; *see also* Petition at 14-16 & n.7 (quoting AT&T’s Brief filed in 1995 with the district court (**“Transmittal 8179 ... make[s] explicit AT&T’s implicit rights under the tariff. Accordingly, the proceeding in the FCC will resolve that issue ....”**)). The district court found that *Mical Communications, Inc. v. Sprint Telemedia, Inc.*, 1 F.3d 1031 (10<sup>th</sup> Cir. 1993), was persuasive authority on one of the factors relevant to the primary jurisdiction referral: whether a decision by the court prior to an Commission response to a petition pending before that agency might result in conflicting decisions. *See First District Court Opinion* at 14 n.10; *see also* Petition at 14-15 n.7 (quoting AT&T’s Brief filed in 1995 with the district court). A tariff transmittal, however, **is a different kind of administrative filing** than the petition for declaratory ruling, *see Mical*, 1 F.3d at 1037, that was at issue in the *Mical* case. As we discuss in Section III.C, below, a tariff transmittal is a carrier-initiated document which, if not withdrawn or deferred by the carrier, or suspended or rejected by the Commission, **becomes effective, i.e., modifies the tariff, within a certain number of days from the transmittal filing date.** *See* 47 U.S.C. § 203(a), (b); 47 C.F.R. § 61.58(a), (b). Until the transmittal becomes “effective” **it is not part of the tariff.** In the interim, the carrier has the power to defer the effective date of a particular transmittal, file an amended version of it, or, as AT&T did in this matter, **withdraw it.**”

27) The Commission not only stated that Judge Politan determined this issue was over when Tr8179 was withdrawn but EVEN IF IT WENT INTO EFFECT IT WOULD BE MOOT as it “modifies the tariff, within a certain number of days.” Petitioners transactions were in January 1995 and therefore even if AT&T 2.1.8 defense went into effect it would not have been applicable as the tariff change was substantive and thus prospective of petitioners transaction.

The DC Circuit understood that its determination on fraudulent use was **not considering** that the plans had already net their fiscal year commitments and were immune because they were pre-June 17<sup>th</sup> 1994 grandfathered.

28) Judge Bassler Decision understood that the Tr8179 filing would **only be prospective** and would have no effect on plaintiffs so as per Judge Bassler’s referral--- any “open issue” referred to the FCC on AT&T’s 2.1.8 defense was already determined as a moot issue:

After Judge Politan’s May 1995 ruling, however, **AT&T withdrew transmittal 8179 purportedly after the FCC advised AT&T that the transmittal would have prospective effect only.** On October 26, 1995, it filed a second transmittal

<sup>[2]</sup> *Second District Court Opinion* at 4.

offering proposed revisions to clarify six of AT&T's tariffs.

29) Judge Bassler "open issues" phrase could not have possibly have been regarding whether AT&T had the right to mandate that a conceded traffic only transfer can be determined by AT&T as a plan transfer. Judge Bassler's decision understood that even if the 2.1.8 modification went into effect it would be prospective and moot to the Inga Companies.

30) Judge Bassler "open issues" phrase must have only had to do about the shortfall infliction issues: The FCC's 2003 Decision clearly shows that the dates of the FCC filings by AT&T and petitioners are August 26, 1996, and September 23, 1996; obviously after the June 1996 shortfall infliction.

31) AT&T was asserting in Judge Bassler's Court its brand-new defense it created in 2005 that on a traffic only non-plan transfer the revenue and time commitments must transfer. Since AT&T was asserting revenue and time commitment must transfer -----and its concern was not meeting revenue commitments -----it would have been totally illogical to also argue in 2005 that AT&T's tariff allowed it to decide if a traffic only transfer must be a plan transfer to force the revenue and time commitments to transfer.

32) AT&T understood that Tr8179 was a substantive change and withdrew it because the Commission was not going to determine that it was already implicit within 2.1.8. If it was **implicit** than why didn't AT&T ever show any written evidence within 15 days that AT&T denied a traffic only transfer and mandated it must be a plan transfer. Implicit but never acted upon? As AT&T counsel conceded the Commission denied AT&T's implicit argument as the Commission determined it would a substantive change and thus prospective.

33) The FCC understood AT&T's position on traffic only transfers as AT&T explicitly detailed it to the DC Circuit Court:

AT&T Reply brief to DC Circuit:

AT&T never stated below that Section 2.1.8 "applied only to the transfer of the CSTPII Plans' themselves," and that the provision is inapplicable to transfers of **traffic only—without the plan and its associated obligations.**

34) So, there is no controversy between petitioners and AT&T that 2.1.8 allowed traffic only transfers and the associated obligations of the plan (revenue and time commitments) do not transfer. It was only after the DC Circuit that AT&T created its brand-new fraud with attempted cover-up on Judge Bassler that revenue and time commitments must transfer on a traffic only transfer. The FCC made short work of the Judge Bassler Referral because AT&T was not allowed to create a new defense in the year 2005 as justification why it denied the traffic transfers in 1995.

So, the FCC's Jan 12<sup>th</sup> 2007 Order properly determined. The district court's June 2006 order **does not expand the scope of the issue previously presented.**

"As discussed in the 2003 Order on Primary Jurisdiction Referral, the Commission has broad discretion under the Administrative Procedure Act and

Commission rules to decide whether a declaratory ruling is necessary to terminate a controversy or remove uncertainty. When, as here, a petition for declaratory ruling derives from a primary jurisdiction referral, the Commission also will seek to assist the referring court by resolving issues arising under the Act. That is our goal here. The district court's June 2006 order does not expand the scope of the issue previously presented. Rather, we have been asked to interpret the scope of section 2.1.8 of AT&T's Tariff No.2, a matter already extensively briefed by the parties." FCC Jan 12<sup>th</sup> 2007 Order Pg. 2 para 3 Exhibit B

35) The only controversy left in this case are issues surrounding the penalty infliction. There are no disputed facts. The parties agree that all plans were pre June 17<sup>th</sup> 1994 ordered as of the January 1995 traffic only transfers.

36) Even though AT&T's 2.1.8 withdrawn defense of being able to force a plan transfer when AT&T conceded it was a traffic only transfer was determined moot by Judge Bassler's decision it is totally irrelevant anyway.

37) It is totally irrelevant because even if it was not prospective AT&T can't overcome the MERITS issue. AT&T's 2.1.8 defense in 1995 was solely based upon its SUSPECTING not being able to collect charges for non-rendered service (aka shortfall charges).

R.L Smith commenting on AT&T's Tr8179 filing to modify 2.1.8:

"Two things to keep in mind about this one. First it indicates intent to and that is a judgment call which would have to be decided in a complaint case if the matter came up. And 'it does not even take intent into account but assumes it is there'"

The FOIA notes show AT&T tried to scam the FCC's R.L. Smith, asserting AT&T's Tr8179 section 2.1.8 defense should not have to grandfather the Inga Companies as existing customers.

"Finally SC (Substantial Cause pleading) says AT&T should not have to grandfather exist cust..... "But this does not make sense."

Finally, SC says ATT should not have to grandfather exist custs as get different admin rules based on only when entered into tps and that develop and implementing such rules would create needless regulatory complexities with attendant costs and delay. But this does not make sense. Would ATT not have to develop the same procedures for all customers now without grandfathering and do they not already have the existing procedures for existing customers. So what is the big deal. The new procedures have to be developed anyway. And they will have to be implemented in any event.

38) As the FCC's R.L. Smith noted AT&T just assumed intent is there. Judge Politan determined the plans were shortfall immune and AT&T's speculation of being deprived of shortfall was not properly substantiated. AT&T needed to establish it had merit in the first place to raise its defense and never did. AT&T never provided any tariff evidence to the FCC to indicate that the plans were no longer pre June 17<sup>th</sup> 1994 immune.

39) Judge Politan offered AT&T the right to come back to his Court with evidence to show why it should impose a \$15 million-dollar security deposit on the March 1996 injunction ----when the plans were immune from AT&T's so called fraudulent use shortfall speculation. AT&T ended up violating its tariff in June 1996 which of course is 18 months after the denied Jan 1995 traffic only transfer.

40) AT&T in June 1996 stated that the plans could no longer be restructured as of that date. The tariff shows that AT&T is wrong and the plans were shortfall immune through 2001. However, even using AT&T's June 1996 assertion with the fact that these are fiscal year revenue commitments----Why then if AT&T took the position that the plans were immune to at least June 1996---how could AT&T possibly assert in January 1995 that AT&T was going to be deprived of shortfall---when AT&T itself conceded the plans were ordered prior to June 17<sup>th</sup> 1994 and immune from shortfall. There was absolutely NO MERIT to suspect being deprived of shortfall charges in the first place.

41) DC Circuit Court Judge Ginsburg and FCC counsel Nicholas Bourne both understood revenue commitments didn't transfer on a traffic only transfer but the issue of AT&T's suspecting shortfall had **no merit** as Judge Ginsburg completed the sentence of the FCC's attorney Nick Bourne:

42) The FCC explained to the DC Circuit Court the "Commission didn't rule on" the June 17<sup>th</sup> 1994 immunity provision that grandfathered plaintiff's plans from shortfall and termination charges. So the DC Circuit Decision on fraudulent use was based upon AT&T having already proved that it had reason to suspect shortfall under its tariff when in fact Judge Politan had already determined AT&T's assertion was unsubstantiated. DC Circuit (Oral Argument Pg. 27 Line 2):

MR. BOURNE: Well, **CCI still had the obligation to pay its shortfall charges**, and there's, there are **other aspects to this** that the **Commission didn't rule on**. I mean, for instance --

JUDGE GINSBURG: Whether they were **grandfathered?**

MR. BOURNE: **Right**. So, it could well be that there were little or **no shortfall**

43) Judge Ginsburg understood revenue commitments do not transfer on a traffic only transfer and understood AT&T's fraudulent use defense had no merit to begin with—a fact based issue already decided by Judge Politan.

44) As the FCC's R.L Smith noted AT&T had no merit to simply assert its sole defense of fraudulent use in the first place! "Two things to keep in mind about this one. First it indicates intent to and that is a judgment call which would have to be decided in a complaint case if the matter came up. And 'it does not even take intent into account but **assumes it is there**."

45) DC Circuit Court Judge Ginsburg and FCC counsel Nick Bourne the FCC's tariff guru R.L. Smith and Judge Politan's non-vacated May 1995 Decision **all understood** AT&T had NO MERIT to suspect shortfall charges in January 1995.. AT&T jumped to second base without getting to 1<sup>st</sup> base.

FCC 2003 Order page 8 para 11:

Based upon our review of AT&T's tariff, we conclude that, **even assuming** that AT&T reasonably suspected a violation of the "fraudulent use" provisions of its tariff – **which we do not decide** – those provisions did not authorize AT&T to refuse to move the traffic from CCI to PSE

Both AT&T's withdrawn 2.1.8 defense and its already defeated 2.2.4 defense were predicated on suspecting that AT&T would be deprived of collecting shortfall charges for non-rendered service (aka shortfall charges).

46) Therefore, the **only open issue** the Commission needs to address the non-disputed facts regarding the penalty infliction controversy. The June 17, 1994 exemption controversy addresses the VERY MERITS of AT&T's defense to stop the traffic only transfer---AND---addresses whether AT&T unlawfully put petitioners out of business in June of 1996 by inflicting shortfall on one plan---but refusing to pay **on all plans** that had no issue of penalties.

47) The Commissions on 8.11.16 Released Public Notice asking for Comments on several declaratory ruling requests regarding the June 1996 penalty infliction and the parties have filed substantial comments. Judge Politan's non-vacated May 1995 and March 1996 Decisions determined the plans were immune from shortfall and termination. AT&T's "fraudulent use defense was denied by the DC Circuit and it was based upon suspecting being deprived of collecting shortfall charges. AT&T Tr8179 "section 2.1.8 implicit" that AT&T could mandate at its sole discretion that a traffic only transfer could be determined a plan transfer ----was solely premised upon suspecting shortfall charges. However, Judge Politan has already determined that AT&T's premise on the dangers of shortfalls **not properly substantiated** by AT&T. See...

The traffic only transfers were in January 1995 and both Judge Politan's May 1995 and March 1996 Decisions determined the **plans were shortfall and termination penalty immune** due to the pre-June 17<sup>th</sup> 1994 tariff immunity provision.

A) District Court: "Suffice it to say that, with regard to **pre-June, 1994 plans**, methods exist for defraying or erasing liability on one plan by transferring or subsuming outstanding commitments into new and better plans pursuant to AT&T's own tariff." District JA pg. 66

B) District Court: “Commitments and shortfalls are little more than illusionary concepts in the reseller industry—concepts which constantly undergo renegotiation and restructuring. The only “tangible” concern at this juncture is the service AT&T provides. The Court is satisfied that such services and their costs are protected. To the extent however that AT&T’s demand for fifteen million dollars’ security is premised on the danger of shortfalls, the Court finds that threat neither pivotal to the instant injunction nor properly substantiated by AT&T. March 1996 Judge Politan Decision (page 19 para 1)

C) District Court: “In answer to the court’s questions at the hearing in this matter, Mr. Inga set forth certain methods for restructuring or refinancing by which resellers can and do escape termination and also shortfall charges through renegotiating their plans with AT&T.” May 1995. Joint Appendix page 78.

D) The Court finds nothing in the Tariff F.C.C. No. 2 which prevents fractionalization, and contemplates a like finding by the F.C.C. Clearly, therefore, plaintiffs have established a strong likelihood of success on the merits. March 1996 Judge Politan Decision Page 16 para 1.

Judge Politan Oral Argument November 15th 1995:

The Court: I have a simple question. Whether you can split the thing in two pieces. That is all the question I had. I mean, you know.  
AT&T counsel Mr La Fiura: I understand

March 1996 Judge Politan Decision See Page 15-16:

The Central issue in this controversy is whether plaintiffs may fractionalize “plans” as contracted between AT&T and its aggregators and as governed by Tariff F.C.C. No. 2. Specifically, the question is whether plaintiffs may transfer traffic under a plan without transferring the plan itself in order to obtain more attractive discounts for end users. The issue of whether Tariff FCC No. 2 permits fractionalization has been referred by this Court to the F.C.C.

Judge Politan understood the plans were pre-June 17<sup>th</sup> 1994 immune and by March 1996 AT&T had already withdrawn its Tr8179 section 2.1.8 implicit defense on June 2<sup>nd</sup> 1995 and AT&T counsel had certified AT&T moved on to Tr9229 and so Judge Politan simply wanted to know if the tariff allowed traffic only non-plan transfers. Based upon the evidence of other aggregators having engaged in traffic only non-plan transfers Judge Politan ordered the injunction.

Judge Politan in 1995 didn’t care which section of the tariff allowed traffic only transfers. Judge Politan looked at 2.1.8 and did not see in the 2.1.8 language “any number” of locations can transfer. Judge Politan only wanted to know does Tariff No 2 allow traffic only transfers.

Oral Argument: November 15th 1995:

Judge Politan: Where does it say this? How do you get to this?

Mr Shipp: How do I get to that?

Judge Politan: Where does it say that in any document or any tariff? Apart from 2.1.8?

AT&T's tariff allowed traffic only non-plan transfers under both 2.1.8 and 3.3.1Q Bullet 4 delete and add.

The DC Circuit Decision did **not** take into consideration that the plans as of the Jan 1995 traffic only transfer had already met fiscal year revenue commitments:

DC Circuit Oral Argument:

MR. BOURNE: There's another possibility is that if the transaction were to occur **mid-year**, for instance, and a carrier had **already met its minimum usage obligations**, then there wouldn't be any issue of -- now, **I don't know the answer to that, but there --**

JUDGE GINSBURG: Okay, okay.

Mr Bourne did not "know the answer to that" by AT&T knows the answer. The agreement with PSE shows that the traffic only transfer was a temporary transfer and petitioners revenue commitment had already been met as per AT&T's **own REVENUE AT RISK REPORT** exhibited in this case. Petitioners had met its revenue commitment and were \$26 million over revenue commitment. As Judge Politan determined there was **no merit** in AT&T's speculation of being deprived of collecting charges for non-rendered services, aka shortfall charges. AT&T subjecting petitioners to Tr8179 was a violation of 203 as it was not implicit within 2.1.8 that AT&T had the right to determine a traffic only transfer was a plan transfer. It violated 202 of the 1934 Communications Act because it would be discriminatory and it would violate 201 of the Act because it would be UNREASONABLE to suspect shortfall on plans that had already met its revenue commitment and were pre-June 17<sup>th</sup> 1994 exempt from shortfall.

The June 17<sup>th</sup> 1994 immunity provision is **prior** to the Jan 1995 traffic only transfer. AT&T can't possibly assert that it could suspect being deprived of collecting shortfall charges when Judge Politan found CCI's plans were immune from shortfall and termination liability.

Shortfall charges is a charge for services never rendered by AT&T. A customer agrees to buy 10 pairs of shoes and the customer buys only 7 pairs of shoes. AT&T charges the customer for the 3 pairs of shoes that the customer did not buy and AT&T keeps the 3 pairs of shoes to sell to someone else. AT&T can't claim that it provided a better discount based upon the revenue committed. AT&T was providing petitioners a 28% discount on \$54.6 million in billing. CT516 was an annual commitment under \$5 million and provided a 66% discount.

When AT&T unlawfully gave its Florida telemarketing company petitioners customer list to attack and drive all the revenue away from petitioners, the discount AT&T provided \$100 a month users under Option S Custom Net was over 40%. AT&T was provided about 60 hours of taped conversations of AT&T sales people making calls to petitioner's office believing they were calling petitioners end-user locations. Not only weren't the charges mandated on petitioners pre-June 17<sup>th</sup> 1994 grandfathered plan---the reality is --as Judge Politan stated---these shortfall charges were not even real costs and certainly were not AT&T's justification to provide the 28% discount as AT&T gave much bigger discounts for much less revenue commitment. AT&T's premise of being deprived of shortfall simply had zero merit.

AT&T own counsel Charles Fash letter of July 3, 1996 also agreed with Judge Politan that AT&T could not have possibly speculated as of January 1995 being deprived of collecting shortfall charges as AT&T didn't unlawfully apply shortfall until 18 months later in June of 1996:

“You claim that AT&T, by placing tariffed shortfall charges on bills sent to CCI's end-users, was somehow stepping outside the established forum for resolution of the collection dispute (supposedly, the pending lawsuit between the parties). In fact, however, this is a new dispute that **has nothing to do with the pending suit.** Indeed, the relevant period for calculation of the of the shortfall charges in issue did not expire until March 31, 1996 and the charges were then billed on the **June 1, 1996 bills.** **AT&T's claim for payment of these charges obviously could not have been the subject of litigation until both of these events had occurred.**

AT&T's position is petitioner's plans were subject to shortfall charges in June 1996; however, the plans were 3-year term commitments. Under the tariff the plans were pre-June 17<sup>th</sup> 1994 grandfathered and thus enjoyed the pre-June 17<sup>th</sup> 1994 terms and conditions for 3 years—until at minimum 1997. The tariff also shows that it was petitioners sole discretion to renew for another 3 years under pre-June 17<sup>th</sup> 1994 terms and conditions. AT&T of course understands it violated the pre-June 17<sup>th</sup> 1994 exemption and that is why it pleaded with the Commission not to interpret the June 1996 penalty infliction. Even under AT&T's self-serving interpretation of the pre-June 17<sup>th</sup> 1994 shortfall and termination immunity exemption AT&T could not have possibly speculated in January 1995 that the plans that were \$26 million over revenue commitment would 18 months later be short of revenue commitment. The plans were short of revenue commitment because AT&T unlawfully ordered the telemarketing attack giving the telemarketers petitioners customer list as the audio tapes in AT&T's possession evidence.

48) This motion is to interpret only the penalty infliction issues as the traffic only transfer issue of mandating that a conceded traffic only transfer is a plan transfer is ---as per Judge Politan's May 1995 determination no longer controversial as it was to determine whether AT&T had the implicit right within 2.1.8 to mandate a plan transfer.

49) It is also moot as per the Judge Bassler's Decision as his Court accurately determined it would be prospective even if it had not been withdrawn by AT&T.

50) Additionally, the traffic only non-plan account movement has already been conceded as permissible by AT&T under 3.3.1.Q Bullet 4 Delete and Add.  
Exhibit D in petitioners initial FCC comments:

51) If you notice, there is no required reference within Bullet 4 to any other tariff section ---such as 2.2.4 fraudulent use---that would first require petitioners from meeting fraudulent use

requirements prior to deleting accounts from its plan and then PSE adding the accounts to its plan.

AT&T COMMUNICATIONS  
Adm. Rates and Tariffs  
Bridgewater, NJ 08807  
Issued: March 10, 1994

TARIFF F.C.C. NO. 2  
12th Revised Page 61.17  
Cancels 11th Revised Page 61.17  
Effective: March 11, 1994

3.3.1.Q. AT&T 800 Customer Specific Term Plan II (continued)

- If the Customer terminates the CSTP II within the first year of the plan and concurrently establishes a new CSTP II of greater value, no additional one time 1/2¢ credit will apply.
- All other specific term plans and service discounts are excluded from the CSTP II with the exception of the \$.01 per minute access line discount. The AT&T 800 Service-Domestic \$.01 per minute access line discount is applied after the Term Plan discount but before the RVPP discount.
- The Customer must commit to an annual commitment for three years as shown in Sections 3.3.1.Q.1. and 3.3.1.Q.8., or two years as shown in Section 3.3.1.Q.7., or one year as shown in Section 3.3.1.Q.9, following.
- The Customer may add or delete an AT&T 800 Service or AT&T Custom 800 Service covered under the plan.
- In the event the Customer converts from another AT&T Term Plan to a CSTP II, there will be no decrease in the percent discount received by the Customer.

*Bullet 4*

52) AT&T asserted under its Tr8179 filing that under 2.1.8 it could force a traffic only transfer to be determined a plan transfer; however, that did not preclude petitioners from moving its end-user account locations via 3.3.1.Q bullet 4 (delete and add). A 2.1.8 transfer is a bilateral transfer in which AT&T is involved in the transfer. AT&T has already conceded when the FCC asked AT&T if the end-users were its customer that these end-user locations were not its customers but customers of petitioners.

FCC 2003 Order page 5:

On February 13, 2003, the Bureau released a Public Notice inviting comment on two discrete questions that were not squarely addressed by the parties on the prior record.<sup>5</sup> Specifically, the Bureau first asked the parties to “comment on

<sup>5</sup> Further Comment Requested on the Joint Petition for Declaratory Ruling on the Assignment of Accounts (Traffic) Without the Associated CSTP II Plans Under AT&T Tariff F.C.C. No. 2, Internal File No. CCB/CPD 96-20, Public

the nature of the relationship, if any, between AT&T and the end-user customers of AT&T's customers, under AT&T's Tariff FCC No. 2 generally, and specifically under the tariff provisions governing the RVPP and CSTP II Plans at issue in this matter."<sup>6</sup>

53) AT&T's comments to the FCC in 2003 conceded that the end-user locations were no longer AT&T customers. These end-user locations were only customers of petitioners. See petitioners initial filing at **EXHIBIT S**. A December 10<sup>th</sup> 1990 letter from AT&T's Annette Mchaffey, the manager of AT&T's Marketing Delivery Center, detailing AT&T's position that the end users can be deleted and added and AT&T will honor all order activity.

AT&T is announcing procedural revisions in servicing Aggregator that will take effect January 1, 1991. As a holder of a Multi-Location WATS (MLW) service plan, and/or 800 Revenue Volume Pricing Plan (RVPP) /Customer Specific Term (CSTP) you are the AT&T customer for all locations that you have designated for inclusion under your discount plan. The purpose of this package is to explain these changes and clarify your role in interacting with AT&T.

Once a location signs up for service under your plan, you have assumed responsibility to AT&T for that location. As a result, that end-user **loses his status as a customer of AT&T**, giving control of the aggregated BTN (Billing Telephone Number) to you, the Aggregator, **including the authority to add, delete**, or change service for that BTN. Accordingly, AT&T will honor all order activity related to a BTN included in your discount plan only from you---the service plan holder.

---

Notice, 18 FCC Rcd 1887 (2003) (*Second Public Notice*). The deadline for filing further comments was extended twice. See *Joint Petition for Declaratory Ruling on the Assignment of Accounts (Traffic) Without the Associated CSTP II Plans Under AT&T Tariff F.C.C. No. 2*, Internal File No. CCB/CPD 96-20, Order, 18 FCC Rcd 3284 (WCB 2003); *Joint Petition for Declaratory Ruling on the Assignment of Accounts (Traffic) Without the Associated CSTP II Plans Under AT&T Tariff F.C.C. No. 2*, Internal File No. CCB/CPD 96-20, Order, 18 FCC Rcd 5713 (WCB 2003).

<sup>6</sup> *Second Public Notice*, 18 FCC Rcd at 1887.



December 10, 1990

One Stop Financial  
198 Colonial Dr.  
Little Falls, NJ 07424

Dear Sir:

AT&T is announcing procedural revisions in serving Aggregators that will take effect January 1, 1991. As the holder of a Multi-Location NATS (MLN) service plan, and/or 800 Revenue Volume Pricing Plan (RVPP)/Customer Specific Term (CSTP) you are the AT&T customer for all locations that you have designated for inclusion under your discount plan. The purpose of this package is to explain these changes and clarify your role in interacting with AT&T.

Once a location signs up for service under your plan, you have assumed responsibility to AT&T for that location. As a result, that end-user loses his status as a customer of AT&T, giving control of the aggregated BTN (Billing Telephone Number) to you, the Aggregator, including the authority to add, delete, or change service for that BTN. Accordingly, AT&T will honor all order activity related to a BTN included in your discount plan only from you —the service plan holder.

As part of these changes, AT&T has created a dedicated organization to process orders for you. Starting January 1, 1991, all requests for service under your plan should be directed through this organization. It is our belief that these changes will allow you to better serve the needs of your customers.

54) AT&T's 2003 Comments from AT&T counsel Mr. Aryeh Friedman leading up to the FCC's 2003 Order agreed with the December 10th 1990 letter from AT&T's manager Annette Mchaffey, that petitioner had sole control to delete and add end-user locations. AT&T simply had no authority to prohibit deleting an account from the Inga Companies plan and had no authority to prohibit adding end-user accounts to PSE's plan.

Based upon AT&T's and Petitioners Comments and the AT&T letter presented the Commission correctly determined that AT&T's tariff 3.3.1Q bullet 4 delete and add permitted the movement of end-user accounts without the plan transferring.

55) FCC Order page 5 para 8:

2. The district court asked "whether section 2.1.8 [of AT&T's Tariff] permits an aggregator to transfer traffic under a plan without transferring the plan itself in the same transaction."<sup>7</sup> Similarly, petitioners' first request for declaratory relief asks the Commission to find that "[a]t the time of the attempted transfer ... in or about January, 1995, by CCI to PSE of the end user traffic under the CSTP II plans held by CCI, neither Section 2.1.8 of AT&T's Tariff F.C.C. No. 2, **nor any other provision of AT&T's Tariff ... prohibited CCI from transferring that traffic without also transferring the CSTP II plans with which that traffic was associated.**"<sup>8</sup> We conclude that section 2.1.8 of AT&T's tariff did not address or govern CCI's and PSE's request and that **its respective tariffs with CCI and PSE permitted the movement of traffic at issue here.**

56) AT&T's 2003 Further Reply Comments to FCC page 1:

"AT&T did not have any carrier relationship with Petitioners' customers (the "end-users"). Petitioners do not dispute the accuracy of these statements; just to the contrary, they repeatedly concede that they and not AT&T had the exclusive carrier-customer relationship with the end-users. Similarly the Petitioners acknowledge that **"although AT&T also rendered bills to Winback & Conserves end-users on the behalf of the latter entity, the billing arrangement selected by the reseller did not create any carrier-customer relationship between AT&T and the end-users."**

57) AT&T Further Reply Comments to FCC Page 4:

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<sup>7</sup> *First District Court Opinion* at 15; *see also Third Circuit Opinion* at 3. Similarly, in its ordering clause, the district court questioned whether the transfer of traffic without the CSTP II Plans "compli[ed] or not with the terms of the governing tariff." *First Preliminary Injunction* at 2.

<sup>8</sup> Petition at 7-8. Tracking the language of section 2.1.8, petitioners refer to the requested movement of traffic from CCI to PSE as a "transfer (assignment)." *See, e.g.,* Petition at 7-8 (Requests No. 1, 3). AT&T uses the term "transfer." *See* Opposition. We find that the relocation of end-user traffic from CCI to PSE would simply have been a movement of traffic from one AT&T aggregator to another. We note that the agreement between CCI and PSE expressly provided for the return of accounts to CCI upon request. *See* Exhibit G to Petition. On a separate point, we note that the deposit provision of AT&T's tariff is not implicated here. In their first and third requests, petitioners seek, *inter alia*, declarations that AT&T had no basis to require a deposit to effect the movement of traffic without the associated plans. *See* Petition at 7-8. AT&T, however, does not argue that any deposit was required to effect the movement of traffic from CCI to PSE and notes that the deposit requirement related to the earlier transfer from the Inga Companies to CCI. *See* Opposition at 9 n.8.

“Petitioners also concede that the *liability* for all charges incurred by each location was solely that of the petitioners not the end-users.”

AT&T Further Reply Comments to FCC page 4:

“As AT&T’s customers-of-record, Petitioners were responsible for the tariffed shortfall and termination charges. Section 3.3.1.Q of AT&T FCC No 2 See also AT&T Further Comments filed April 2<sup>nd</sup> 2003 (“AT&T’s Further Comments 2003”) at 7-8.

FCC’s 2003 Declaratory Ruling pg 7 footnote 52

“*See generally* AT&T Tariff FCC No. 2; AT&T Contract Tariff FCC No. 516. As AT&T concedes, the end-users or “locations,” were CCI’s customers, **not AT&T’s.** *See* AT&T Further Comments at 6-10 (citing, *inter alia*, *AT&T Corp. v. Winback & Conserve Program, Inc.*, 16 FCC Rcd at 16075, para. 3; *First District Court Opinion* at 3); *see also* *MCI Telecommunications Corp v. AT&T*, File No. E-90-28, Order, 7 FCC Rcd 5096, 5100, para. 20 (CCB 1992). Because these end-users did not choose AT&T as their primary interexchange carrier, **AT&T had neither proprietary interest in these individual end-user locations nor an expectation of revenue from them.** *See* *Hi-Rim Communications, Incorporated v. MCI Telecommunications Corporation*, File No. E-96-14, Memorandum Opinion and Order, 13 FCC Rcd 6551, 6559 para. 13 (CCB 1998). Accordingly, AT&T **could not refuse to move them out of CCI’s CSTP II and into PSE CT 516.** The fact that CCI sought to move all of its end-user locations, rather than just one or a few locations, **did not confer a right on AT&T where none otherwise existed.**

58) As in a 2.1.8 bilateral transfer under a 3.3.1Q bullet 4 the new customer (PSE) would also be responsible for bad debt if the end-user location did not pay its phone bill. Additionally, petitioner’s plans, under a 3.3.1Q bullet 4 delete and add, would continue to be responsible for the revenue and time commitment on the non-transferred plan as a 2.1.8 transfer.

59) Thus AT&T’s 2003 Comments to the FCC has already conceded that it had no authority under the tariff to prevent one AT&T customer (petitioners) to delete its end-use locations, and another AT&T customer (PSE) to add locations. **AT&T never claimed that it was implicit within 3.3.1.Q Bullet 4 that AT&T could mandate that a traffic only non-plan transfer could be deemed a plan transfer.** Even if AT&T suspected that end-users would not meet revenue commitments AT&T had authority under 2.1.8 or 3.3.1Q Bullet 4 to prohibit the account movement without the plan.

60) Using 3.3.1.Q Bullet 4 would require 2 separate orders –one to delete and one to add. Petitioners maintained Letter of Agency under the tariff –which is similar to full power of attorney--- to move its end-user location customers to any telecom discount plan petitioners wanted and it would not require end-user signature to delete the end-users from one plan and add the end-user locations to PSE’s plan.

61) Therefore, the issue of whether traffic can be moved without the plan has already been resolved in petitioners favor under both 2.1.8 and 3.3.1Q Bullet 4 delete and add. Of course, AT&T had no merit of suspecting shortfall charges in the first place as AT&T conceded the

plans were immune from shortfall charges at the time of the January 1995 traffic only transfers. The only controversy remaining in this case is the duration of the immunity, the illegal billing remedy and AT&T's failure under the FCC's October 1995 Order to file a substantial cause pleading to meet the substantial cause test.

62) Petitioners have filed an email from the Florida Department of Revenue (Florida) to petitioners. That email wanted to know what the status was in the Commissions resolution of the penalty infliction controversy. AT&T has conceded that in its July 1997 settlement with the Inga Companies Co-Petitioner Combined Companies, Inc. (CCI) that CCI was paid substantial cash and AT&T claimed it was compensated for the approximately \$80 million in shortfall and termination charges it claims were lawful under the tariff.

63) AT&T claims it was compensated for the \$80 million in a form other than cash when CCI agreed to provide its services to AT&T to help it defend AT&T against the continued claims of the Inga Companies. The Florida Department of Revenue considers the trading of services as barter and thus if the \$80 million were actually permissible Florida said it is entitled to taxes on \$80 million bartered. AT&T has conceded in FCC comments that it did not pay Florida but AT&T claimed the statute of limitations has passed.

64) However, when Florida was advised that it was AT&T's assertion that the statute of limitations has passed Florida sent petitioners Florida law showing AT&T's assertion is false. Petitioners have filed the Florida law provided by Florida where there is no statute of limitations for Florida to collect its money from AT&T.

65) Florida is still anxiously waiting for the Commissions determination as to whether the \$80 million should have been inflicted in June of 1996. Florida's position is that if the \$80 million in shortfall and termination charges should not have been inflicted in the first place then Florida would not have been able to collect taxes. So, Florida's waits for the Commission to resolve the penalty infliction issues as the interest owed Florida has accumulated into the many millions.

66) AT&T is a sure loser here as if the Commission rules the charges were **not** permissible then petitioners have additional damages. If the Commission rules the charges were permissible, then Florida wants its taxes as AT&T **concedes it intentionally beat Florida.**

67) AT&T has the chance to lose on both sides of the coin so an interpretation of all possible violations is mandatory. If the Commission determines that the charges were permissible (Florida wins) but if the Commission also determines that 1) there was an **illegal billing remedy,** then AT&T can't rely upon the charges. 2) If the FCC determines AT&T violated the FCC's October 1995 Order in meeting the substantial cause test then AT&T would be precluded from asserting its \$80 million in charges. So, AT&T could lose to both Florida and to Petitioners.

68) Furthermore, 800 Services, Inc. and other AT&T aggregator resellers are in the wings waiting for the Commission to rule on the penalty infliction declaratory ruling requests. The Commission has already received substantial comments to the June 2016 and July 2016 declaratory ruling requests that the Commission released public notice on 8.11.16.

69) The case spent 13 months on circulation and the Commissioners came to the same conclusion as the FCC's Pricing Line Bureau's Jan 12<sup>th</sup> 2007 Order: There were no controversies

referred in Judge Bassler's 2006 referral as per the traffic only transfer issue that were within the scope of the original 1995 referral on fraudulent use controversy. The ONLY controversy left that has non-disputed facts is the penalty infliction.

70) The Commission's Order on the penalty infliction should address **both** the Inga Companies holding the plans and CCI holding the plans. The Inga Companies holding the plans would have come first as that transaction would have come prior to the CCI to PSE transfer due to the deposit requirement hold up that did not get resolved until May 1995 by Court Order.

71) **The Commission must temporarily suspend the traffic only transfer referral as petitioners motion the NJFDC for sanctions and damages.** The Commission needs to put the penalty infliction controversy on circulation and may decide if a new circulation case title would be more appropriate: "For pre-June 17<sup>th</sup> 1994 Ordered CSTPPII/RVPP plans interpret the June 17<sup>th</sup> 1994 Immunity Exemption Duration, the Infliction of Charges in excess of the Location Discount and whether AT&T's failure not to file a FCC Substantial Cause Pleading as per the FCC October 1995 Order precludes any AT&T defense under Discontinuation Without Liability Section." Or use as the circulation name the name used within the FCC's 8.11.16 Public Notice.

72) Summary: Judge Politan's non-vacated May 1995 Decision **determined** the outcome of Tr8179 would end AT&T's so called "implicit 2.1.8 defense." Multiple AT&T counsels conceded the FCC denied AT&T's 2.1.8 implicit defense. Tr9229 was the replacement for Tr8179 and that was **prospective** and AT&T conceded that Tr9229 was just another way to accomplish what it wanted but in a different way without judging intent.

Judge Bassler's Decision explicitly stated Tr8179 would have been **prospective** if it went through so obviously, that is conclusive that this failed 2.1.8 defense which was based upon suspicion of shortfall would be moot as to petitioners transfers even if it went through.

Even if it went through AT&T advised Judge Bassler "it could have been accomplished" with a plan transfer as AT&T would have still provided the 66% discount as opposed to the 28% discount.

Because the plans were immune there was **no merit** in suspecting being deprived of shortfall in the first place. As the FCC's R.L. Smith understood: AT&T ran from home plate directly to second base, without ever securing the 1<sup>st</sup> base **MERITS ISSUE!** It was a temporary transfer and AT&T's own Revenue At Risk Report indicates the fiscal year's revenue commitments had already been met.

73) AT&T incredibly held up a transaction based up being SUSPICION of being deprived of the collection of charges for NON-RENDERED Service (aka shortfall). AT&T has now conceded the plans were pre-June 17<sup>th</sup> 1994 shortfall and termination charges immune in January 1995.

Al Inga President  
Group Discounts, Inc.  
One Stop Financial, Inc.  
Winback & Conserve Program, Inc.  
800 Discounts, Inc.